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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RALPH DANIEL CLARKE,

Defendant and Appellant.

F039839

(Super. Ct. No. SCO82785A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Robert T. Baca, Judge.

Kyle Gee, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, John G. McLean and George M. Hendrickson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Ralph Daniel Clarke, was convicted of 18 sex crimes. He appeals, raising numerous challenges to counts 3 through 18. Counts 3 through 18 occurred from 1970 to 1987 and were charged under the authority of Penal Code section 803,

subdivision (g);¹ a special supplementary statute of limitations for certain sex crimes against minors. Under the recent United States Supreme Court case of *Stogner v. California* (2003) 539 U.S. ____ [123 S.Ct. 2446] defendant's convictions in counts 3 through 18 must be reversed.

Discussion

Defendant was charged and convicted of 18 separate sex crimes against three separate victims. The crimes began in the early 1970's against defendant's daughter, and then continued against the daughters of defendant's girlfriends. He was convicted in count 1 of forcible sexual penetration occurring in 2000. (§ 289, subd. (a).) In count 2 he was convicted of sexual battery while the victim was restrained, occurring in 2000. (§ 243.4, subd. (a).) Defendant does not raise any issues challenging counts 1 and 2; thus we shall not discuss them further.

Counts 3 through 9 involved sex crimes occurring between 1970 and 1977. Counts 10 through 14 involved sex crimes occurring between 1978 and 1983. Counts 15 through 18 alleged violations from 1983 to 1987.

Counts 3 through 18 were all charged pursuant to the authority contained in section 803, subdivision (g). Subdivision (g)(1) of that section provides: "Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289, or 289.5."

After briefing was completed in this case, the United States Supreme Court held that section 803, subdivision (g), as applied to crimes that were already time-barred when

¹ Further statutory references are to the Penal Code unless otherwise noted.

the section was enacted, violates ex post facto principles. (*Stogner v. California, supra*, ____ U.S. at p. ____.) Section 803, subdivision (g) was enacted on September 7, 1993, effective January 1, 1994. (*See* Stats 1993, ch. 390 (Assem. Bill No. 290 (1993-1994 Reg. Sess.)).)²

After the *Stogner* opinion was filed, defendant filed a supplemental letter brief arguing that counts 3 through 18 fell within the ruling of *Stogner* and the ex post facto clause of the United States Constitution and must be reversed.³ In outlining the timeframes for counts 3 through 18, to demonstrate that these counts must be reversed pursuant to *Stogner* because the statute of limitations expired before section 803, subdivision (g) became effective, defendant states:

“The latest among Counts 3 through 18, in terms of the charging window, was Count 18, with a charging window of September 11, 1986, through September 10, 1987. In 1987, the statute of limitations for a violation of section 288, subdivision (a) was six years (Pen. Code, § 800), which would have expired as to Count 18 on September 11, 1993. The bill which enacted section 803(g) did not become effective until January 1, 1994.” (Fn. omitted.)⁴

Although defendant reaches the right conclusion, we note that his calculations regarding count 18 are erroneous. Defendant was convicted in count 18 of violating section 288a, subdivision (b)(1), not section 288, subdivision (a). The statute of

² In his supplemental letter brief, appellant cites to the wrong chapter and session numbers for the enactment of section 803, subdivision (g).

³ In defendant’s supplemental letter brief, he concludes by stating that this court “must reverse Mr. *Stogner*’s conviction as to Counts 13 through 18.” (Emphasis added.) We understand this to mean that defendant’s counsel is asking us to reverse Mr. *Clarke*’s convictions on counts 3 through 18.

⁴ Respondent filed a supplemental letter brief in response to defendant’s brief, stating agreement that counts 3 through 18 must be dismissed.

limitations for a violation of section 288a, subdivision (b)(1) is three years. (§ 801) Thus the statute of limitations ran out in 1990, well before the enactment of section 803, subdivision (g).⁵

The statute of limitations had expired on counts 3 through 18 before the enactment of 803, subdivision (g). Under the authority of *Stogner* these counts must be reversed.

Defendant does not challenge counts 1 or 2 on any grounds. The remaining arguments relating to counts 3 through 18 are moot in light of the reversal of these counts.

We have reviewed the sentencing hearing and find that the arguments by the parties and the sentencing by the court on counts 1 and 2 were inextricably intertwined with the remaining counts. Neither count 1 nor count 2 was the principal term. Under these circumstances, and given the inherently integrated nature of a felony sentence under the current statutory scheme, a remand for resentencing is required. On remand the trial court is entitled to consider the entire range of sentence choices but may not impose a prison term that exceeds the original aggregate sentence. (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1254, 1258.)

Disposition

The judgment as to counts 3 through 18 is reversed. While the judgment of conviction on counts 1 and 2 is affirmed, we remand this matter to the trial court for resentencing.

⁵ We also note that although the information alleged a charging period in count 18 of September 11, 1986 through September 10, 1987, the verdict form contained a charging period of September 11, 1984 through September 10, 1985. Because count 18 must be reversed under *Stogner* utilizing either charging period we need not discuss the error in the verdict form.

VARTABEDIAN, J.

WE CONCUR:

DIBIASO, Acting P. J.

CORNELL, J.